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No. 09-109

Supreme Court, U.S.
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In the Supreme Court
of the United States

GERALD WILLIAM CARDINAL,
Petitioner,

v

LINDA METRISH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the words "appropriate relief" in Section 2000cc-2 of the Religious Land Use and Institutionalized Persons Act clearly and unequivocally indicate that the States and state officials waived their sovereign immunity under the Eleventh Amendment from monetary damages by accepting federal funds.

PARTIES TO THE PROCEEDING

The Petitioner in this matter is Gerald William Cardinal, an inmate, who is incarcerated in Michigan. The Respondent Linda M. Metrish is the warden of the Hiawatha and Kinross Correctional Facilities.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-18a) is reported as *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009). The opinion of the United States District Court for the Western District of Michigan (Pet. App. 19a – 27a) is reported as *Cardinal v. Metrish*, 2008 U.S. Dist. LEXIS 19719 (W.D. Mich. 2008).

JURISDICTION

Respondent Linda Metrish agrees with Petitioner Gerald Cardinal's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in Petitioner's petition (Pet. 1-3).

COUNTER-STATEMENT OF THE CASE

Facts and Proceedings

Cardinal maintains that Metrish violated his rights under the Religious Land Use and Institutionalized Persons Act (RLIUPA). That statute, in pertinent part, provides:

> No government shall impose a substantial burden on the religious exercise of a person residing or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that the imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[1]

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[1] 42 U.S.C. § 2000cc-1(a).

RLUIPA further provides that "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain *appropriate relief* against a government."[2] In passing RLUIPA, Congress used its authority under the Spending Clause.[3] RLUIPA imposes a heightened statutory protection on any program or activity that receives federal financial assistance.[4]

In 2006, Cardinal, a Michigan inmate now on parole, filed suit seeking monetary and equitable relief against Metrish, the Warden of the Hiawatha Correctional Facility (HTF) and the Kinross Correctional Facility (KCF)[5] in her individual capacity for violations of his rights under the Eighth Amendment, and against her in her individual and official capacities for violations of RLUIPA.[6] Cardinal subsequently withdrew his claims against Metrish in her individual capacity under RLUIPA.

Cardinal was housed at HTF in 2005. While at HTF, Cardinal participated in the kosher meal program. On March 2, 2005, Cardinal received several major misconduct violations that required him to be placed in temporary segregation. HTF inmates can only be held in segregation for eight hours so prison officials transferred Cardinal to KCF on March 2, 2005. KCF did not serve kosher meals. Cardinal refused to eat non-kosher meals while at KCF.

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[2] 42 U.S.C. § 2000cc-2(a). (emphasis added)

[3] U.S. CONST, art. I, § 8, cl. 1.

[4] 42 U.S.C. § 2000cc-1(b)(1).

[5] Metrish retired from HTF and KCF on December 14, 2007.

[6] 42 U.S.C. § 2000cc, *et seq.*

Pursuant to Michigan Department of Corrections (MDOC) policy, segregation staff at KCF observed Cardinal for seventy-two hours and then notified health services on March 5, 2005, that Cardinal refused his meals.

Metrish did not become aware that Cardinal refused his non-kosher meals until March 7, 2005. (Pet. App. 26a).

The following day, on March 8, 2005, Cardinal was transferred to a temporary segregation unit at the Chippewa Correctional Facility. The Chippewa facility accommodated Cardinal's dietary needs.

Regarding the federal suit Cardinal filed under the Eighth Amendment and RLUIPA, Metrish moved for summary judgment. A magistrate judge subsequently issued a report and recommendation recommending dismissal of Cardinal's complaint. The district court adopted the magistrate judge's report and recommendation and held: that Metrish was entitled to sovereign immunity as to Cardinal's RLUIPA claim for money damages; that Cardinal's equitable relief claim was moot because the MDOC transferred him to a facility that provided kosher meals; and that Metrish was entitled to summary judgment regarding Cardinal's Eighth Amendment claim (Pet. App. 19a-27a).

Cardinal appealed to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed the district court (Pet. App. 1a-18a). In affirming the district court the Court of Appeals held that "[B]ecause RLUIPA's 'appropriate relief' language does not clearly and unequivocally indicate that the waiver extends to

monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA."[7]

REASONS FOR DENYING THE PETITION

This case presents a poor vehicle for resolution of any conflict among the circuits because the only issue at stake is "nominal damages." There are four circuits, including the Sixth Circuit here, which have rejected the claim that RLUIPA is sufficiently clear to serve as a waiver by the States of their sovereign immunity under the Eleventh Amendment. The departing circuit, the Eleventh, concluded that the RLUIPA was sufficiently specific so as to encompass monetary damages. But the Eleventh Circuit also concluded that the prisoner would be limited to "nominal damages" under the Prison Litigation Reform Act (PLRA) in the absence of a showing of physical injury.

Here, Cardinal never alleged that he suffered a physical injury. Therefore, even if this Court were to find that Cardinal was entitled to monetary damages under RLUIPA, PLRA would act as independent bar to his ability to collect other than "nominal" damages. This Court should await a RLUIPA case that arises from its protection of religious liberty from a land-use regulation where significant monetary damages will likely be at issue.

Moreover, Cardinal attempts to portray this case as one that presents an "entrenched" conflict that this Court must resolve now. Any conflict, however, is not deeply entrenched. All but one of the circuit courts that have interpreted RLUIPA's "appropriate relief" language have reached the same conclusion – that such language

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[7] *Cardinal*, 564 F.3d at 801.

is insufficiently clear to condition receipt of federal funds on a waiver of sovereign immunity as to damage claims under RLUIPA.

And as to the Eleventh Circuit, it should be given an opportunity to revisit its holding, particularly in light of the four other circuit court opinions including this one that have been decided this year with all of those circuits concluding that the RLUIPA language was not sufficiently clear to determine that sovereign immunity from money damages was waived. The decision of the Sixth Circuit, along with those of the Fourth, Fifth, Seventh, and Eighth circuits, are better-reasoned – if this Court were inclined to reach this issue in a case arising from an institutionalized person, it should examine an Eleventh Circuit decision on the issue.

Finally, Cardinal argues that this Court should grant certiorari because the Court of Appeals effectively held a portion of RLUIPA unconstitutional. But the Court of Appeals never held that Congress lacked the authority to condition the disbursement of federal funds on a waiver of immunity. Rather, the Court of Appeals held that Congress had chosen not to exercise its power in this instance. The Court of Appeals simply applied the rules of statutory construction and held that Congress chose not to exercise its power to condition the disbursement of federal funds on a waiver of immunity.

I. This Court should deny review because the Prison Litigation Reform Act's physical injury requirement would act as an independent bar to Cardinal's ability to obtain any damages other than "nominal" damages.

Even if this Court were to adopt Cardinal's argument that he is entitled to money damages, the PLRA acts as an independent bar to his ability to collect damages.[8] The PLRA provides that a prisoner may not bring an action for mental or emotional injuries without demonstrating a physical injury. The PLRA's damage prohibition explicitly applies to RLUIPA.[9]

A review of the district court record indicates that Cardinal did not allege any sort of physical injury that would allow him to proceed under the PLRA. At best, Cardinal could collect nominal damages for a violation of his rights under RLUIPA. In rejecting the Fourth Circuit's reasoning in *Madison v. Virginia,*[10] the Eleventh Circuit determined that only "nominal damages" would be available for the prisoner:

> Here, Smith [i.e., the prisoner] has alleged violations of RLUIPA due to the burden placed upon his religious exercise, but no physical harm. He seeks nominal, compensatory, and punitive damages. It is clear from our case law, however, that the latter two types of damages are precluded under the PLRA, *Napier*, 314 F.3d at 532, but that nominal damages may still be recoverable. *Hughes*, 350 F.3d at 1162. Thus, although we

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[8] 42 U.S.C. § 1997e(e).

[9] 42 U.S.C. § 2000cc-2(e).

[10] *Madison v. Virginia,* 474 F.3d 118 (4th Cir. 2006).

> conclude, as a general matter, that RLUIPA's phrase "appropriate relief" contemplates monetary as well as injunctive relief, in this case it is clear that Smith's monetary award, if any, will be limited to a grant of nominal damages, in light of the limiting language of § 1997(e).[11]

This Court would be better served by waiting and deciding a case from the land-use portion of the statute where more than nominal damages are available to a plaintiff. The district court and the Court of Appeals both concluded that Cardinal did not set forth a claim under the Eighth Amendment. Thus, even if this Court were to resolve this issue in Cardinal's favor, he would still be barred from collecting damages under the PLRA.

Rather than grant certiorari to evaluate an issue that ultimately only implicates "nominal" damages, this Court should await an issue that arises from RLUIPA's statutory protections related to land use regulations. See 42 U.S.C. § 2000cc-a(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person[.]"). Although the issue whether an institutionalized person's rights under RLUIPA were violated is a significant one, the importance of whether the States have waived their protection from money damages under the Eleventh Amendment is blunted where the States will only be subject to "nominal" damages.

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[11] *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

II. The conflict over whether RLUIPA's "appropriate relief" language is not fully developed so as to warrant this Court's review.

A. The conflict identified by Cardinal is not entrenched.

At best, Cardinal has identified a shallow conflict between the circuit courts. To date, five circuits have held that RLUIPA's "appropriate relief" language does not authorize suits for damages against the States or state officials when sued in their official capacities.[12] Specifically, those circuits (Fourth, Fifth, Seventh, and Eighth) concluded that the language contained in RLUIPA did not provide a clear enough waiver to States and state officials that they waived their sovereign immunity under the Eleventh Amendment. The D.C. Circuit reached the same conclusion in examining the phrase "appropriate relief" in the Religious Freedom Restoration Act concerning whether the federal government waived its sovereign immunity to monetary damages.[13]

The Eleventh Circuit in *Smith v. Allen* reached the opposite conclusion holding that the term "appropriate relief" encompassed both injunctive and monetary

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[12] *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009); *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009); *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009); *Van Wyhe v. Reisch*, __ F.3d __ (8th Cir. 2009), 2009 U.S. App LEXIS 20235 (8th Cir. 2009).

[13] *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006)(Congress need not use magic words to waive sovereign immunity, but the language it chooses must be unequivocal and unambiguous. RFRA's text falls short on this standard. We therefore hold that RFRA does not waive the federal government's sovereign immunity for damages.")(citation omitted).

relief.[14] The Eleventh Circuit reasoned that since the term did not expressly exclude money damages that federal courts should presume that damages are available.[15]

Contrary to Cardinal's assertion, the conflict referenced above is far from "entrenched" (Pet. 10). It is important to note that, with the exception of the Fourth Circuit's decision in *Madison v. Virginia*, the Eleventh Circuit decided *Smith* before any of the other circuit courts had an opportunity to review the issue of whether RLUIPA's "appropriate relief" language permitted damages against States and state officials. The four circuit courts that have addressed the issue since the *Smith* decision reached the opposite conclusion. Each of those four circuits identified serious flaws in the *Smith* decision.

The Eleventh Circuit has not had the opportunity to confront the four decisions from the other circuits this year that have addressed the issue in the instant case. As a consequence, this Court should allow additional circuits to weigh in on this question and afford the Eleventh Circuit the opportunity to address the issue in light of the recent decisions of *Sossamon* (Fifth Circuit), *Cardinal* (Sixth), *Nelson* (Seventh), and *Van Wyhe* (Eighth). Given the fact that these decisions have been released in rapid succession, the Eleventh Circuit should be given an opportunity to revisit this issue in light of subsequent case law.

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[14] *Smith*, 502 F.3d 1255.

[15] *Smith*, 502 F.3d at 1270-1271 ("Congress expressed no intent to the contrary within RLUIPA, even though it could have, by, for example, explicitly limiting the remedies set forth in § 2000cc(a) to injunctive relief only.").

B. The decision below of the Court of Appeals is correct.

Further review by this Court is not warranted because the ruling below is correct. The Eleventh Circuit's opinion in *Smith* cannot be squared with this Court's decisions.

The Court of Appeals properly recognized that, "[B]ecause RLUIPA's 'appropriate relief' language does not clearly and unequivocally indicate that the waiver extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA."[16] Put another way, before a court will presume that States waived their sovereign immunity conditioned on the receipt of federal funds, the statutory language must be unmistakably clear.[17]

In *Lane v. Pena*, this Court indicated that "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."[18] Additionally, this Court held that there is no such thing as a constructive waiver. In fact, this Court indulges "[E]very reasonable presumption against waiver."[19]

Since RLUIPA's "appropriate relief" language is, at best uncertain, regarding what type of relief is available,

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[16] *Cardinal*, 564 F.3d at 801.

[17] *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[18] *Lane v. Pena*, 518 U.S. 187, 192 (1996).

[19] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999).

no damage remedy should be presumed. As the Fifth Circuit noted in *Sossamon*, RLUIPA's "appropriate remedy" language is not sufficiently clear in light of this Court's sovereign immunity jurisprudence.[20]

Citing *Franklin v. Gwinnett County Public Schools*,[21] the Eleventh Circuit concluded, if Congress did not give any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies.[22] Similarly, in his petition Cardinal cites this Court's decision in *Barnes v. Gorman*,[23] to stand for the proposition that "[S]tates are on notice that by accepting federal prison funding, they are liable for compensatory damages and would be even if RLUIPA was completely silent as to available remedies." (Pet. App 13)

Contrary to Cardinal's position and the Eleventh Circuit's holding, *Franklin* and *Barnes* are inapposite because neither case involved a question of state sovereign immunity. Monetary relief might be appropriate against counties or municipalities because the Eleventh Amendment generally does not apply to them. Had the Eleventh Circuit used the proper analytical framework, it may well have reached a different conclusion. Consequently, the Eleventh Circuit's opinion is flawed.

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[20] *Sossamon*, 560 F.3d at 331.

[21] *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68-69 (1992).

[22] *Smith*, 502 F.3d at 1270.

[23] *Barnes v. Gorman*, 536 U.S. 181 (2002).

Simply stated, this case does not present the "compelling reasons" required by Supreme Court Rule 10 to warrant the granting of certiorari.

III. The Court of Appeals did not effectively invalidate an Act of Congress.

Cardinal argues that this Court should grant his petition because the Court of Appeals' decision effectively held a key provision of a civil rights law unconstitutional (Pet. App. 11). That assertion is wrong.

The Court of Appeals did not invalidate an Act of Congress. Nor did the Court of Appeals conclude that Congress could not condition the disbursement of federal funds on a waiver of immunity. Rather, employing principles of statutory construction, the Court of Appeals held that Congress had chosen not to exercise its authority to do so in this instance. Cardinal's attempt to inject a constitutional question into this case when there is none should be rejected.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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